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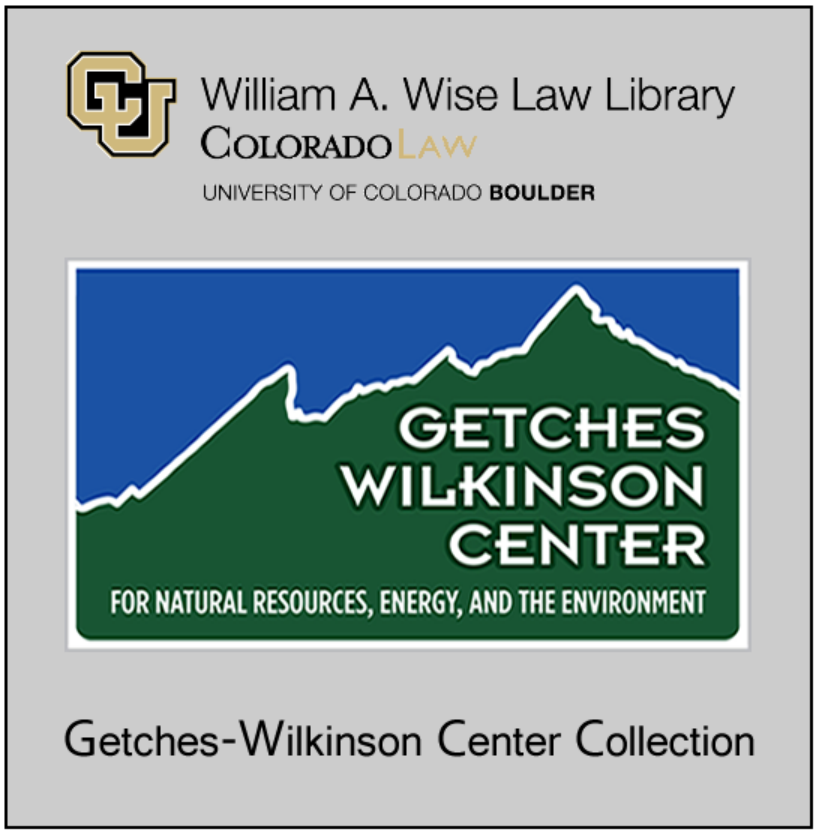
Private Lands Conservation in Palau

University of Colorado. Natural Resources Law Center



Private Lands Conservation in Palau

A Report by the Natural Resources Law Center

University of Colorado School of Law

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BRIEF QUESTIONS

1. **What legal tools are in place for the purpose of achieving private lands conservation?**

   The existing statutory framework does not expressly provide for private lands conservation.

2. **What legal tools are recognized by the legal system and capable of being used for private lands conservation?**

While there is little law expressly on point, there is much that can be inferred from the statutes that would indicate that Palaun citizens may engage in private lands conservation. First, easements and servitudes are recognized as legal interests in real property. These interests can be created in perpetuity. Only Palaun citizens may own land, but they may dispose of it as they see fit. Overall, Palau has a modern system of property recording and transfer rights. Finally, the Palau National Code officially recognizes the American Law Institutes Restatements of Law as authoritative when there is no law on the books to the contrary. Given the legal framework in Palau it is conceivable that conservation easements are indeed viable, though as of yet untried.

Additionally, Palau has a strong system for conservation of public lands. Under the National Heritage Reserve System Act, Palau has the institutional capability to create conservation areas with use prohibitions or restrictions. Furthermore, under the act, private citizens may donate land to the government, either national or state, for the express purpose of creating a conservation area. Palau is an emerging nation and one of its few assets is its natural environment. Its legal system reflects a strong commitment to preserving this unique and valuable environment.

3. **Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation?**

Legislation that expressly recognizes conservation easements would be the strongest move to ensure the viability of such efforts. Politicians or local groups proposing such legislation would

not be sailing in completely uncharted waters, as Palau already recognizes easements, has a strong commitment to conservation, and also recognizes the Restatements of Law as authoritative. Thus, it seems that legislation allowing conservation easements would have a strong chance of success. Another possible avenue in this vein would be setting up test cases in Palau and seeing whether or not the judicial system will uphold a conservation easement.

The National Heritage Reserve System Act may also prove to be a fruitful avenue for private lands management. The framework for conservation easements is there, but there do not appear to be any implementations within this context yet. Testing whether or not a foreign donor can fund the private acquisition and subsequent donation of lands to the government would be a good first step.

INTRODUCTION

This report provides a basic description of the legal instruments, processes, and institutions relevant to private lands conservation that are currently available in the Republic of Palau. It also assesses the feasibility of introducing certain legal tools into the Palau legal system for the purpose of achieving private lands conservation, with particular emphasis given to the potential use of conservation easements. Section I of the report provides a contextual overview of Palau by discussing relevant aspects—i.e., those pertaining to land—of its history, culture, geography, demographics, government and legal framework. Section II is a brief overview of the several rights and restrictions on land use and land alienation that are legally recognized in Palau. It also describes Palau's institutional framework for the administration of private lands, and details the various laws and procedures relevant to this administration. Section III details the rights and restrictions pertaining to private lands. The next section describes private land administration in Palau, with a particular focus on land transfer and registration. Section V examines the legal tools available for private lands conservation, and any analogs available for public lands.

Where possible, the document provides examples of applications of these laws. The last section of the report suggests certain steps that might be taken in order to introduce conservation easements, or similar concepts, in Palau.

I. Relevant Background

A. Land and Peoples

Geography and climate

The Republic of Palau consists of a clustered archipelago, lying 470 miles east of the Philippines.[1] It is part of the Micronesia system of islands. Palau's islands are broken into three categories – high islands, low coral atolls, and isolated islands. The first category contains the majority of the nation's population and includes the islands of Babeldaob, Koror, Peleliu, and Angaur. Babeldaob is the second largest island in Micronesia, behind Guam, and comprises 153 square miles. Koror, however, is the economic center and capital of Palau.[2] In all, Palau covers 458 square miles.[3] Similar to the United States, Palau has both a federal government and a local government. The latter is broken into 16 states.

The climate is tropical, with an average daily high of 87 degrees Fahrenheit, and an average daily low of 75. Humidity averages 85% and annual rainfall is 147 inches. February and March are the driest months, while June through August are the wettest. While Palau lies outside the major typhoon tracks, it does occasionally get hit by significant storms.

Palau boasts Micronesia's richest flora and fauna, both on its islands and beneath its seas. The fauna includes exotic birds and crocodiles, while the flora includes rare orchids. Many travelers fly to Palua to take advantage of its pristine SCUBA diving opportunities, particularly at the scenic Rock Islands.

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[1] Lonely Planet Micronesia at 319 [will fix this citation]
[2] *Id.* at 323

Population

According to the U.S. Department of State, Palau's population in 2003 was 19,129 people, with 35.4% under the age of eighteen, 6.6% over the age of sixty-five, and a 2.3% growth rate.[4] Palauns are of Micronesian decent, with Malayan and Melanesian elements. English is the official language in all 16 states, along with Palaun. Life expectancy is 64.5 years for men and 70.8 years for women.

B. History

The following passage comes directly from the Palau Visitors Authority website and provides a brief history of the islands.

> The Republic of Palau underwent several transitions before attaining independence under the Compact of Free Association in 1994 with the United States. The most noteworthy first foreign contact took place in 1783 when the vessel Antelope, under the command of English Captain Henry Wilson, was shipwrecked on a reef near Ulong, a Rock Island located between Koror and Peleliu. With the assistance of Koror's High Chief Ibedul, Wilson and his men stayed for three months to rebuild his ship. From that time onward, many foreign explorers called on Palau, and the islands were exposed to further European contact.
>
> Foreign governance of our islands officially began when Pope Leo XIII asserted Spain's rights over the Caroline Islands in 1885. Two churches were established and maintained by two Capuchin priests and two brothers, resulting in the introduction of the Roman alphabet and the elimination of inter-village wars. In 1899, Spain sold the Carolines to Germany, which established an organized program to exploit the islands' natural resources.
>
> Following Germany's defeat in WWI, the islands were formally passed to the Japanese under the 1919 Treaty of Versailles. The Japanese influence on the Palauan culture was immense as it shifted the economy from a level of subsistence to a market economy and property ownership from the clan to individuals. In 1922, Koror became the administrative center for all Japanese possessions in the South Pacific. The town of Koror was a stylish metropolis with factories, shops, public baths, restaurants and pharmacies.
>
> Following Japan's defeat in WWII, the Carolines, Marianas and Marshall Islands became United Nations Trust Territories under U.S. administration, with Palau being named as one of six island districts. As part of its mandate, the U.S. was to improve Palau's infrastructure and educational system in order for it to become a

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[3] U.S. Dept of State, Background Note, at http://www.state.gov/r/pa/ei/bgn/1840.htm
[4] *Id.*

> self-sufficient nation. This finally came about on October 1, 1994, when Palau gained its independence upon the signing of the Compact of Free Association with the United States.[5]

History of Land Ownership

Prior to western contact, land tenure in Palau was unique in that ownership was restricted to village or district councils (public lands) or matriarchal lineages (mangroves).[6] During the Japanese occupation from 1938-1941, the Japanese instituted a land registration program in Palau that shifted property ownership from clans to individuals.[7] Except for the states of Angaur, Peleliu, and Airai, records of the Japanese land registration program still exist and are known as the *Tochi Daicho,* or "Land Book." [8] The listings in the *Tochi Daicho* have been deemed as authoritative by the Palau Court such that "clear and convincing evidence" must be adduced to show that the Japanese records are erroneous.[9]

The Lands Claim Reorganization Act of 1996 established a Lands Court. Its statutory goal is to "hold hearings and make determinations with respect to the ownership of all land within the Republic" by 2001.[10] The statute also intends to have all property memorialized by a certificate of title which shall give notice to all others and establish *prima facie* evidence of ownership.[11] Finally, the Land Court is supposed to return land previously acquired by occupying powers to the original and rightful owners.[12] The Land Court also recognizes decisions from its predecessors, the Land Claims Hearing Office and Land Commission as *prima facie* evidence of ownership.[13]

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[5] The following passages concerning the history of Palau comes from the Palau Visitors Authority, found at http://www.visit-palau.com/aboutpalau/history.html

[6] Land Tenure in the Pacific at 197 (University of the South Pacific, 3rd Ed. 1987) (hereafter "LUSTAJ").

[7] LUSTAJ § 24:3, at 81 (Supp. 1997).

[8] *Id.*

[9] *Id.* citing *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625 (1989).

[10] LUSTAJ § 24:3, at 80 (Supp. 1997) (We were not able to obtain materials to confirm whether this objective has been met).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 81.

Thus, the statute legitimizes previously documented title to property, while at the same time providing a method for further cataloging property rights in Palau. The Land court will be discussed in more detail below.

B. Government

Palau's government is based on that of the United States. While it is modeled after the U.S., it still has earmarks of more traditional forms of governance. The current form of government appears a bit cumbersome given the small population and land-base in Palau, yet it has nonetheless taken root in the last ten years.

Palau's government consists of a democratic republic with directly elected executive and legislative branches. Presidential elections take place every four years to elect a president and vice president, who run on separate tickets. The Palau National Congress has two houses; the Senate with nine members elected nationwide and the House of Delegates with 16 members, one from each of Palau's 16 states. Even though some states have as few as 100 people, each state also elects its own governor and legislature.[14]

The Council of Chiefs is an advisory body to the president containing the highest traditional chiefs from each of the 16 states. It is consulted on matters concerning traditional laws and customs.[15]

The judicial system consists of the Supreme Court, National Court, the Court of Common Pleas, and the Land Court. It is a unified judiciary with its power derived from the Constitution. The Supreme Court is the court of general jurisdiction, has trial and appellate divisions, and is presided over by the Chief Justice.[16] The Supreme Court currently has four members. Typically, hearings in the Trial Division are presided over by a single judge, while appeals are heard by a

[14] U.S. State Department
[15] *Id.*

three-judge panel. The Court of Common Pleas is a court of limited jurisdiction and has concurrent jurisdiction in all civil cases, except those involving land where the amount at issue is greater than $1,000.[17] The National Court, while still on the books, is currently inactive.

II. Overview of Legal Context

For such a small country in terms of physical size and population, Palau's legal framework features an extensive patchwork of sources. The legal context is built upon the following legal authorities: (1) the Republic of Palau Constitution; (2) the Palau National Code ("PNC"); (3) Palau State Law; (4) Palau Traditional Law; and (5) the Restatements of Law as published by the American Law Institute ("ALI").

Republic of Palau Constitution

Palau's Constitution is modeled after that of the United States. This section contains information on the language pertinent to a discussion of land laws.

The Constitution's preamble itself states that the people of Palau "proclaim and reaffirm our immemorial right to be supreme in these islands of Palau, our homeland."[18] The Constitution is the supreme law of the land.[19] Under the Constitution, the government "shall take no action to deprive any person of life, liberty, or *property without due process of law nor shall private property be taken except for a recognized public use and for just compensation in money or in kind.*"[20]

The Constitution is also mindful of "Traditional Rights" and maintains that statutes and traditional law shall be equally authoritative.[21] In the case of conflict between a statute and traditional law, "the statute shall prevail only to the extent it is not in conflict with the underlying

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[16] *Id.*
[17] *Id.*
[18] Constitution, Preamble
[19] Constitution, Art. II, § 1.
[20] Constitution, Art. IV, § 6 (emphasis added).

principles of the traditional law."[22] Additionally, the government has a duty to take positive action to implement national policies, including the "conservation of a beautiful, healthful, and resourceful national environment."[23]

The Constitution provides a severe restriction on foreign ownership of land in Palau. The Constitution states, "Only citizens of Palau and corporations wholly owned by citizens of Palau may acquire title to land or waters in Palau."[24] Lands in Palau are not to be taxed thus removing one of the primary incentives for conservation efforts.[25]

Palau National Code

In reviewing the PNC, we have used the 1995 version of the code, with the 1999 supplement. While we have not been able to obtain a complete copy of the most recent 2003 supplement, we have been able to review the 2003 update to the code and have determined that it does not materially alter pertinent sections in the 1999 update.[26]

The PNC amalgamates numerous sources of law to complete the body of governing law in Palau. Importantly, the PNC reflects statutes enacted by the national legislature, states, the Trust Territory Code, and traditional laws.[27] Laws involving land use and ownership are codified in the PNC itself, though, and appear to be the guidelines by which modern land usage is determined.

State Law

While the PNC recognizes the existence of state laws,[28] the balance of power tips in favor of the federal government. The Constitution provides that all governmental powers "not expressly

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[21] Constitution, Art. V, §§ 1, 2.
[22] *Id.*
[23] *Id.* at Art. VI.
[24] *Id.* at Art. XIII, § 8.
[25] *Id.* at Art. XIII, § 9.
[26] We obtained a list of the 2003 amended sections from the University of Hawaii. From the list, we were able to ascertain that none of the sections we review in this report were amended.
[27] 1 PNC § 301.
[28] *Id.*

delegated by this Constitution to the states nor denied the national government are powers of the national government."[29] In this respect, the legal system of Palau differs dramatically from that of the United States.

Traditional Laws

The codification of land laws indicates that Palau is moving toward a more modern system of land use and management. However, traditional laws still play a role in Palau, as evidenced by the conflict of laws provision of the Constitution.[30] The Constitution states.

> The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.[31]

Furthermore, the Constitution cursorily deals with the intersection of traditional and statutory law, "Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law."[32] Unfortunately, the Palau National Code appears to conflict with the constitution on this point.

> The customs of the people of Palau not in conflict with the legal authority set out in Section 301 of this chapter [the statutory framework for Palau] shall be preserved. The recognized customary law of the Republic shall have the full force and effect of law so far as such customary law is not in conflict with such legal authority.[33]

There is little guidance provided in Palaun legal materials that fleshes out the exact intersection between traditional and codified laws. Given the trend toward modernization and utilization of the statutory framework, particularly for establishing land practices, it seems that the Palau National

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[29] Constitution, Art. XI, § 2.
[30] Constitution, Art. V, § 1
[31] *Id.*
[32] Constitution, Art. V, § 2.
[33] 1 PNC § 302.

Code would be the best source of authority. However, it is recommended that more local research on this topic be undertaken.

The Restatement of Laws

Palau is a common law jurisdiction and utilizes both its own legal decisions and the restatements of law as approved by the ALI in interpreting its Constitution and the PNC.[34] Importantly, the

> rules of the common law, as expressed in the restatements of law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decisions in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provide in section of 305 of this chapter....[35]

Thus, in areas that are not covered by the PNC, the Restatement (Third) of Property may be used to supplement Palaun laws.

III. Rights and Restrictions Pertaining to Private Lands

A. Ownership of Private Property

Title 39 of the PNC covers real property.[36] As noted above, foreigners may not obtain title to real property in Palau.[37] Citizens of Palau and corporations wholly owned by Palaun citizens may hold title to land in Palau.[38]

IV. Private Land Administration

A. Institutional Framework

Since the Japanese occupation in 1938, Palau has developed a tradition of modern land recordation. In 1996, the legislature passed the Land Claims Reorganization Act ("LCRA").[39]

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[34] 1 PNC § 303.
[35] *Id.*
[36] 39 PNCA.
[37] Constitution, Art. XIII, § 9.

The primary goal of the LCRA is to register all land in Palau prior to 2001 and return land previously acquired by occupying powers to the original and rightful owners.[40] It also established the Land Court, replacing the Land Claims Hearing Office and instituted new procedures for registering and transferring real property.[41]

The Land Court recognizes previous Land Claims Hearing Office decisions as *prima facie* evidence of ownership.[42] Additionally, land registered during the Japanese occupation, 1938-41, will be also be accepted as authoritative by the Land Court, placing the burden of proof on any claimant of land registered during this period to prove otherwise.[43] Thus, the statute legitimizes previously documented title to property and embraces a civil judicial solution as the method for dispute resolution.

Combined with sections of the PNC regarding real property,[44] Palau has a robust system in place (at least on paper) for recording and transferring real property. Unfortunately, it does not appear that any sections of the code expressly mention conservation easements.

B. Land Transfer

Land transfers are covered by 39 PNCA §101, et seq., and 35 PNCA § 1315. As noted above, only Palaun citizens and wholly owned corporations can own real property in Palau.[45] However, non-citizens can lease land for a term of up to, but not exceeding, 50 years.[46]

Land held in fee simple may be transferred, devised, sold or otherwise disposed of at such a time and in such a manner as the owner alone may desire.[47] This alienability supersedes any

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[38] 39 PNCA § 301.
[39] 35 PNCA § 1301, et seq.
[40] *Id.* at § 1302 (it is not known whether this goal has been met).
[41] *Id.* at § 1304.
[42] LUSTAG § 24:3 at 81 (Supp. 1997); 35 PNCA § 1304.
[43] *Id.*
[44] *See* 39 PNCA § 101, et seq.
[45] 39 PNCA § 301.
[46] *Id.* at § 302.
[47] 39 PNCA § 403.

"established local customs which may control the disposition or inheritance of land through matrilineal lineages or clans."[48] Land transfers must be recorded with the Clerk of Courts.[49] The Clerk of Courts will also keep an index as the Supreme Court may direct.[50] Transfers may be registered by either (1) acknowledging the instrument of transfer before the Clerk of Courts and depositing a copy thereof with him; or (2) making a sworn statement, written or oral, in the presence of three witnesses not benefiting from the transfer, that a transfer was made and to whom. These statements shall be noted in the land register by the Clerk of Courts.[51] The creation or transfer of an interest in real property is also subject to the Statute of Frauds.[52] Unrecorded transfers are not enforceable against subsequent bona fide purchasers for value:

> No transfer of or *encumbrance* upon title to real estate or *any interest therein*, other than a lease...not exceeding one year, shall be valid against any subsequent purchaser or mortgagee of the same real estate or interest...in good faith for a valuable consideration without notice of such transfer or encumbrance, or against any person claiming under them, if the transfer to the subsequent purchaser or mortgagee is first duly recorded.[53]

Thus, Palau has a land transfer and registration system that, on paper, resembles that of many states in the United States. The italicized terms, "encumbrance" and "any interest therein," suggest that easements and servitudes are implicitly recognized by the PNC. Again, however, there is no express mention of conservation easements.

C. Land Registration

The Land Court has jurisdiction over determining property rights among parties or between a party and the government.[54] In the registration process, the Land Court first makes a

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[48] *Id.* (whether this represents a true conflict between traditional laws and statutory laws is not mentioned).
[49] 39 PNCA § 401.
[50] *Id.* (I have not found anything that demonstrates the "manner" in which the Supreme Court directs).
[51] *Id.*
[52] 39 PNCA § 501.
[53] 39 PNCA § 402 (emphasis added),
[54] 35 PNCA § 1304.

determination of rights among parties. This determination entails different components for cases involving the government and cases involving private parties. Next, the Land Court oversees the process for adjudicating these claims. The process is the same for both types of claims. This section first addresses the determination of rights then details the process for registration.

The Land Court shall award ownership of public land held by the government to private citizens under the following circumstances.[55] To prevail on a claim to public land, the citizen must prove that (1) the land became part of the public land, or became claimed as part of the public land, as a result of the acquisition by previous occupying powers prior to January 1, 1981, through force, coercion, fraud, or without just compensation; and (2) that prior to that acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land.[56] The citizen may use previous Palau Land Commission or District Land Title Officer proceedings as evidence of ownership.[57] The Land Court will use its discretion in reviewing the record and claim, and will award ownership if it deems the citizen has satisfied the two prongs of the statute.[58]

The Land Court will also issue a determination of ownership in cases involving competing claims between citizens.[59] If the land has already been surveyed and a disputehas been amicably resolved between the parties, the Land Court will ratify this agreement.[60] If the parties disagree as to ownership of the land, the Land Court will refer the claim to the Trial Division of the Supreme Court to make the determination, considering evidence from both parties.[61]

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[55] *Id.* at § 1304(b).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at § 1304(c).
[60] *Id.*
[61] *Id.* at § 1304(d).

In all situations, the process for registering land begins with the filing of a claim and a survey of the designated land.[62] Once a claim has been filed, all claimants must attend the survey.[63] Other interested parties, such as adjacent land owners may also attend.[64] Registration Officers conducting the survey must use their best efforts to consult with traditional leaders from the area where the disputed claim lies.[65] A claimant that fails to personally attend a scheduled survey automatically incurs a fine of $250.[66]

Once the land is surveyed, then the Land Court will adjudicate the claim according to the rules outlined above. The claim is adjudicated at a public hearing.[67] Notice of the hearing must be given to the community at least 120 days prior to the hearing.[68]

Once the claim is adjudicated the determination of ownership must be placed in a permanent register.[69] The PNC also states exactly what needs to be recorded and in what manner.

> All security interests in land, and releases or satisfactions thereof, leases of one year or more, *easements or use rights* of more than one year, or abstracts of the above, shall be in a deed and cross-referenced in a manner calculated to give persons inspecting the register notice of the [interest in land].[70]

Again, the Palaun system appears to be predicated upon many U.S. states' systems for land and title registration.

Recording of Easements and Interests

Because conservation easements have been critical to TNC's efforts today, this section gives a brief summary of statutory authority for easements and other interests in land. The PNC provides authority for the validity of easements in general by stating that easements run with the

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[62] *Id.* at 1306.
[63] *Id.* at 1307.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at § 1309(c).
[68] *Id.* at § 1308(b).
[69] *Id.* at § 1314.

land in perpetuity, unless repealed or extinguished.[71] Easements must be recorded with the Clerk of Courts, according to the process outlined above.[72]

After reviewing the most recent updates to the PNC, there have been no material additions to the sections concerning easements or use rights. Additionally, in using the most recent version of the annotated PNC, there are no annotations that would suggest that there is case law directly on point.

C. Establishing Clear Title

Since Palau is still attempting to register and document all its lands, the registration process detailed above represents the most important process for establishing clear title to land. After years of occupation by multiple foreign entities and an even longer history of traditional property rights, the PNC devotes significant attention to the process of establishing and recording property interests.[73]

After the Land Court determines ownership and the time period for appeal of this determination has expired, the Land Court issues a certificate of title setting forth the owners and the precise interest in land.[74] This certificate of title "shall be conclusive upon all persons so long as notice was given...and shall be prima facie evidence of ownership subject to any leases or use rights of less than one year, which need not be stated in the certificate."[75] Failure to record the certificate renders the interest invalid against subsequent bona fide purchasers for value.[76] Thus, going through the Land Court and registering the title with the Clerk of Courts appears to be the most effective means of obtaining clear title.

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[70] *Id.* (emphasis added).
[71] *Id.* at § 1313(b).
[72] *Id.* at § 1314.
[73] *See* 35 PNCA § 1301, et seq.; 39 PNCA § 101 et seq.
[74] 35 PNCA § 1313(a)(2).
[75] *Id.*
[76] 39 PNCA § 402; *see also* 35 PNCA § 1314.

D. Dispute Resolution

The Land Claims Reorganization Act of 1996 establishes the Land Court as the primary institution for land dispute resolutions.[77] The Land Court has jurisdiction to hear claims by citizens against the government, as well as claims by citizens against other citizens.[78] Palau is committed to a civil system of adjudicating land claims. It is also an important part of the emerging nation's development, as it seeks to lay the groundwork for a more western style of governance.

V. Legal Tools in Place for Private Lands Conservation

A. Conservation Easements

While Palau has not expressly recognized conservation easements on private lands, it is a common law jurisdiction that relies upon the ALI Restatements of Law as authoritative. Thus, there is room in the Palaun legal regime to advance their recognition. This section describes modern trends in conservation easements in the U.S. and elsewhere.

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right, granted by an owner of real property, to use all or part of his or her property for specific purposes.[79] Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a conservation easement.[80] A conservation easement is thus a voluntary, legally enforceable agreement in which a landowner agrees (usually with a governmental entity or NGO) to limit the type and amount of development that may occur on his or her property in order to achieve the goal of conservation. They are legally recorded deed restrictions that "run with the land" and can be obtained voluntarily through donation or purchase from the landowner.

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[77] 35 PNCA § 1304.
[78] *Id.*
[79] Black's Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).
[80] Depending on the type of resource they protect, easements are frequently referred to by different names—e.g., historic preservation easements, agricultural preservation easements, scenic easements, and so on.

Traditionally, an easement was "affirmative" (carrying rights to specified actions) and "appurtenant" (attached to a neighboring parcel of land). For example, one landowner might hold an easement in the land of a neighbor, allowing him or her to cross the neighbor's property or draw water from the neighbor's well. In contrast to conventional easements, conservation easements are generally "negative" (prohibiting specified actions) and "in gross" (that is, they may be held by someone other than the owner of a neighboring property). While a conventional easement involves the conveyance of certain affirmative rights to the easement holder, an easement for conservation purposes involves the relinquishment of some of these rights and a conferral of power in the new holder of the rights to enforce the restrictions on the use of the property. This is a critical distinction—the landowner relinquishes the right to develop the land, but that right is not conveyed to the easement holder. That particular right (to develop the land) is extinguished.[81] What the easement holder does acquire is the right to enforce the land-use restrictions.

To understand the concept of an easement, it is helpful to think of owning land as holding a bundle of rights—a bundle that includes the right to occupy, lease, sell, develop, construct buildings, farm, restrict access or harvest timber, and so forth. A landowner may give away or sell the entire bundle, or just one or two of those rights. For instance, a landowner may give up the right to construct additional buildings while retaining the right to grow crops. In ceding a right, the landowner "eases" it to another entity, such as a land trust. However, in granting an easement over the land, a landowner does not give away the entire bundle of ownership rights—but rather forgoes only those rights that are specified in the easement document.[82]

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[81] Conservation easements generally extinguish development rights. However, with certain types of agreements—such as those involving *purchased development rights* (PDRs)—the development rights are not necessarily extinguished, but instead become the property of the easement holder. PDRs are generally classified as easements in gross.

[82] The grantor of a conservation easement remains the title holder, the nominal owner of the land. The landowner conveys only a part of his or her total interest in the land—specifically, the right to develop the land. However, the landowner retains the right to possess, the right to use (in ways consistent with the easement), and the right to exclude others. Daniel Cole, Pollution and Property 17 (2002).

1. Appurtenant conservation easements

In legal terms, conservation easements generally fall into one of two categories: (1) *appurtenant easements*; and (2) *easements in gross*. An appurtenant easement is an easement created to benefit a particular parcel of land; the rights affected by the easement are thus *appurtenant* or *incidental* to the benefited land. The land subject to the appurtenant easement is called the *servient estate*, while the land benefited is called the *dominant estate*. Unless the grant of an appurtenant easement provides otherwise, the benefit of the easement is automatically transferred with the dominant estate—meaning that it "runs with the land."[83] Under the majority U.S. common law authorities, an appurtenant easement does not require the dominant and servient estates to be adjacent to one another—an easement may be appurtenant to noncontiguous property if both estates are clearly defined and if it was the parties' intent that the easement be appurtenant.[84] There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.[85] In such jurisdictions, there are a number of ways to meet—

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[83] Roger Bernhardt and Ann Burkhart, Real Property in a Nutshell 191, 214 (4th ed. 2000). An interest "runs with the land" when a subsequent owner of the land has the burden or benefit of that interest. An appurtenant easement runs with the land since the servient estate remains subject to it after being transferred, and the dominant estate retains the benefit after being transferred. With an easement in gross, the benefit cannot run with the land as there is no dominant estate—however, provided certain requirements are met, the burden can run with the land.

[84] Verzeano v. Carpenter, 108 Or.App. 258, 815 P.2d 1275 (1991) ("[W]e agree with the majority view that an easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties' intent that it be appurtenant.") (citing 7 Thompson on Real Property § 60.02(f)(4)); see also Day v. McEwen, 385 A.2d 790, 791 (Me.1978) (enforcing reserved "right of an unobstructed view" over servient tenement where dominant tenement was on the other side of a public road); Private Road's Case, 1 Ashm. 417 (Pa.1826) (holding that a circumstance in which a navigable river intervenes between a meadow and an island is no legal reason why a way across the former should not be appurtenant to the latter); Saunders Point Assn., Inc. v. Cannon, 177 Conn. 413, 415, 418 A.2d 70 (1979) (holding that while an easement appurtenant must be of benefit to the dominant estate, the servient estate need not be adjacent to the dominant estate); Woodlawn Trustees, Inc. v. Michel, 211 A.2d 454, 456 (1965) (holding that in cases of noncontiguous parcels, the easement over the land of the servient tenement is valid and enforceable if, by means of a right of way of some sort which traverses land of another, the servient tenement benefits the dominant tenement).

[85] Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 23 (2003).

or potentially relax—the adjacency requirement while furthering the goal of private lands conservation. The following list is a brief sample of such methods:[86]

Purchase by NGOs of land that can serve as adjacent estates – A method for an NGO to meet an adjacent lands requirement by acquiring, via purchase or donation, land adjacent to the property to be subject to the easement. This allows the NGO's property to be the dominant estate, and the NGO to hold the easement over adjoining lands.

- **Creative "nexus" arguments for non-adjacent lands** – A potential method for creating a valid appurtenant easement between non-adjacent properties by establishing (e.g., by successfully arguing its existence in a court of law) an adequate nexus between the properties in question. In Costa Rica, the Center for Environmental Law and Natural Resources (CEDARENA) created an appurtenant easement between a parcel of private land and a nearby state reserve that shared the same birds.

- **Reciprocal easements** – Enables adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.[87] Working with private landowners, conservation groups in Latin America have used reciprocal easements that grant a third-party NGO the right to enforce the easement—with express authority to

[86] The information is taken primarily from Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 23–24 (2003).

[87] In order to take advantage of federal and state tax incentives, U.S landowners must grant the conservation easement to either a governmental entity or an authorized NGO. Thus, while the use of reciprocal easements between private landowners is potentially

enter the property, monitor compliance, and seek judicially enforcement of the rights and obligations derived from the easement. Thus, the use of reciprocal easements can potentially provide a conservation NGO with enforceable rights over land, without the need for the NGO to own adjacent land.

- **Use of public lands as the dominant estate to hold an easement** – Easements over private land have been created in several Latin America countries by using adjacent or nearby public lands as the dominant estate. In some instances, the easements have also provided a third-party NGO with the right to enforce its terms.

- **Legal limitations and uncertainties to third-party enforcement** – The common law of some jurisdictions only recognizes the right of an easement's holder to enforce its terms. Thus, depending on the jurisdiction in question, the practice of granting a third-party NGO the right to enforce the easement may or may not survive legal scrutiny. Additionally, the relevant legal authority is often unclear as to whether the grant to an NGO of the right to monitor and enforce an easement is a real property right that runs with the land, or a personal right enforceable only against the original maker of the easement.

Under the common law adhered to in the U.S., third party enforcement of a conservation easement would be invalidated in court due to a basic principle of contract law which mandates only the

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an effective method for achieving private lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.

parties to the contract may enforce its terms. However, many U.S. states have laws authorizing the assignment of this specific power to non-profit organizations—provided the assignment is written into the conservation easement. Since Palaun law has ties to both ALI Restatements and the common law, it seems that this may be an acceptable practice in Palau.

2. Conservation easements in gross

Unlike an appurtenant easement, an easement in gross is not created for the benefit of any land owned by the owner of the easement, but instead attaches personally to the easement owner—regardless of whether the owner of the easement owns any land.[88] At common law an easement in gross could not be transferred. Today, however, there are many jurisdictions where legislation and more modern trends in the relevant common law have authorized the transferability of easements in gross as embodied in the Restatement.[89]

As noted above, both an appurtenant conservation easement and a conservation easement in gross meet the legal criteria for what is known as a negative easement—an easement that prohibits the owner of the servient estate from doing something. Conservation easements are negative in character because they prevent the owner of the burdened estate from developing the land, typically in any way that would alter its existing natural, open, scenic, or ecological condition. However, while the common law has generally recognized and enforced certain limited types of negative easements, it has generally refused to enforce negative easements in gross. Due to doubts over the validity and transferability of negative easements in gross at common law,

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[88] Examples of typical easements in gross include the right of a non-owner to harvest timber, mine minerals, extract water or other items from the owner's land.

[89] Restatement (Third) of Property, Servitudes, §4.6 (T.D. No. 4, 1994), provides that all easements in gross are assignable unless contrary to the intent of the parties. It eliminates the restriction of the first Restatement that only commercial easements in gross are assignable.

statutes have been enacted in most U.S. states authorizing conservation easements—both in gross and appurtenant.[90]

In addition to statutorily authorized interests in land, U.S. common law recognizes a number of interests in land that have the potential to facilitate the goal of private lands conservation in the Palau. Among these interests are real covenants, equitable servitudes, easements and profits. It is important to note, however, that while the common law recognizes these interests, it has traditionally imposed requirements that, in many instances, render their use problematic for conservation purposes. The American Law Institute's Restatement (Third) of Property has simplified the law governing real covenants, equitable servitudes, easements and profits by combining the rules governing these interests into a single doctrine—that of the Servitude. This modernized law of servitudes has also largely eliminated the common law impediments to the use of these interests for conservation purposes.

Uniform Conservation Easement Act

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA). The Act's primary objective is to enable "private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments."[91]

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[90] Jesse Dukeminier and James E. Krier, Property 856 (4th ed. 1998). Traditionally, courts have disfavored interests conveyed "in gross" and negative easements because they can cloud title and may raise recordation problems—the difficulty being notice to future landholders. However, in the U.S. legislation with proper recordation requirements and limitations upon those who may hold these kinds of interests have largely overcome these objections.

[91] UCEA, Prefatory Note, 12 U.L.A. 166 (1996). An online copy of the UCEA is available at the following address: http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm.

The UCEA defines "conservation easement" as "[a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include: (1) retaining or protecting natural, scenic, or open-space values of real property; (2) assuring its availability for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property.[92]

The UCEA has made conservation easements more certain devices by eliminating several common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.[93]

A unique feature of the Act is the "third-party enforcement right." Under the Act, an easement may empower an entity other than an immediate holder to enforce its terms. The third-party must be a charitable organization or governmental body eligible to be a holder. Additionally, one organization may own the easement, but delegate enforcement to another, provided the terms of the easement allow it.

Restatement (Third) of Property

The PNC expressly states that ALI Restatements of law can fill gaps in the PNC and other legal sources. The most notable gap is the lack of statutory law covering conservation easements.

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[92] UCEA, §1(1)—Definitions.
[93] § 4, 12 U.L.A. 179.

This section details the Restatement's treatment of covenants and conservation easements. For this section, it must be remembered that there are no materials found that document where exactly the Restatement applies and where it does not. A broad reading of the Palau Constitution would indicate that the Restatements are authoritative to the extent that they do not conflict with Palaun laws, thus making the following sections a strong framework from which to implement conservation easements in Palau. However, it must also be noted that no materials found suggest that conservation easements have been used in Palau at this date.

The Restatement (Third) of Property recognizes conservation easements (servitudes)[94] and states that they are the most common use of negative easements.[95] Early on, there was doubt about whether the benefits of a conservation easement could be held in gross (i.e., not running with land) so most states enacted authorizing statutes.[96] However, as previously noted, the most recent Restatement eliminates restrictions on the creation and transferability of benefits in gross,[97] so "there is no longer any impediment to the creation of servitudes for conservation or preservation purposes."[98] Additionally, the benefits may be granted to third parties who are not involved in creating the easement.[99]

The benefits of conservation easements are often held by governmental and conservation entities, and public funds are usually spent to acquire them. As a result, the public's interest in enforcing conservation easements is "strong,"[100] and "special protections"[101] are afforded them.

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[94] In the latest Restatement, "servitude" is a generic term that covers "easements, profits, and covenants." Restatement (Third) of Property §§ 1.1(2), 1.1 cmt. a, 1.1 cmt. d (2000).
[95] *Id.* at § 1.2 cmt. h (2000).
[96] *Id.* at §§ 1.2 cmt. h, 2.6 cmt. a.
[97] *Id.* at §§ 2.6, 4.6.
[98] *Id.* at § 2.6 cmt. a.
[99] *Id.* at § 2.6(2).
[100] *Id.* at § 8.5 cmt. a.
[101] *Id.* at § 1.6 cmt. b.

For instance, if the benefits are held by a governmental body or conservation organization,[102] the conservation easement may not be modified or terminated unless (1) the particular purpose for which the easement was created becomes impracticable; or (2) the easement can no longer be used to accomplish a conservation purpose.[103] If the changed condition is attributable to the holder of the servient estate, damages may be charged.[104] To further secure the conservation easement, governmental bodies or conservation organizations may enforce it by coercive remedies (e.g., injunctions) and other methods (e.g., require restoration).[105] Lastly, benefits held by governmental bodies or environmental organizations may only be transferred to other governmental bodies and environmental organizations (unless the creating instrument provides otherwise); whereas all other benefits in gross are freely transferable.[106]

A. Leases, "Leaseback" Agreements, and Reserved Life Interests

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands conservation. The PNC recognizes leaseholds and even provides for foreigners to obtain leases for a period of less than 50 years.[107] A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.[108] A "leaseback" agreement allows a

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[102] "A 'conservation organization' is a charitable corporation, charitable association, or charitable trust whose purposes or powers include conservation or preservation purposes." *Id.* at § 1.6(2).

[103] *Id.* at § 7.11(1)-(2).

[104] *Id.* at § 7.11(3).

[105] *Id.* at § 8.5 (including cmt. a).

[106] *Id.* at § 4.6(1)(b)-(c).

[107] 39 PNCA § 302.

[108] Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the landowner (or his or her heirs) to terminate the lease. This arrangement would provide the landowner with ongoing control over land use while providing some security of tenure to the conservation NGO.

landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case, a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

A landowner could also transfer fee simple title to the land to a conservation NGO (by donation or sale), but reserve a life interest in the land. This method would enable the landowner to remain undisturbed on the land for life. The landowner also has the assurance that without further legal action the conservation NGO will assume control of the land upon his or her death.

As discussed earlier, recent Palau legislation aims to make available its private land for leasing. It is not clear, however, whether leaseholds entered into strictly for the purpose of conservation would be allowed, because there is no law on point for conservation leaseholds.

B.Real covenants

A real covenant is a promise concerning the use of land that (1) benefits and burdens both the original parties to the promise and their successors and (2) is enforceable in an action for damages.[109] A real covenant gives rise to personal liability only. It is also enforceable only by an award of money damages, which is collectible out of the general assets of the defendant.[110] If the promisee sues the promisor for breach of the covenant, the law of contracts is applicable. If, however, a person who buys the promisee's land is suing, or a person who buys the promisor's land is being sued, then the law of property is applicable.[111] The rules of property law thus determines when a successor owner can sue or be sued on an agreement to which he or she was not

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[109] Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

[110] This historic remedy for breach of a real covenant is damages, measured by the difference between the fair market value of the benefited property before and after the defendant's breach.

a party. Two points are essential to understanding the function of these rules. First, property law distinguishes between the original parties to the covenant and their successors. Second, each real covenant has two "sides"—the burden (the promissor's duty to perform the promise) and the benefit (the promissee's right to enforce the promise).

In order for the successor to the original promissor to be obligated to perform the promise—that is, for the *burden* to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must "touch and concern" land;[112] (4) horizontal privity must exist;[113] (5) vertical privity must exist;[114] and (6) the successor must have notice of the covenant. In contrast, the common law traditionally required only four elements for the *benefit* of a real covenant to run to successors: (1) the covenant must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to benefit their successors; (3) the benefit of the covenant must touch and concern land; and (4) vertical privity must exist.

The Restatement (Third) of Property (Servitudes) has eliminated a number of these traditional common law requirements. The horizontal privity requirement and the prohibition on third party beneficiaries have been entirely eliminated. Also, the prohibition on covenant benefits in gross, the touch and concern requirement, and the vertical privity doctrine have been replaced with doctrines designed to more effectively accomplish their respective purposes. Pursuant to the

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[111] English courts never extended the concept of real covenants outside the landlord-tenant context. American courts, however, extended it to promises between fee simple owners or neighbors.

[112] For the covenant to "touch and concern land," it must relate to the direct use or enjoyment of the land. A covenant that restricts the development on a parcel meets this requirement.

[113] The common law traditionally requires that the original parties have a special relationship in order for the burden to run, called horizontal privity. In some U.S. states, horizontal privity exists between the promissor and the promisee who have mutual, simultaneous interests in the same land (e.g., landlord and tenant). Other U.S. states also extend horizontal privity to the grantor-grantee relationship.

Restatement's approach, a covenant is a servitude if either the benefit or the burden runs with the land. The *benefit or burden* of a real covenant runs with the land where (1) the parties so intend; (2) the covenant complies with the Statute of Frauds; and (3) the covenant is not otherwise illegal or violative of public policy.[115]

C. Equitable servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.[116] An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by injunction. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,[117] for the *burden* of an equitable servitude to bind the original promissor's successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;[118] (2) the original parties must intend to burden successors; (3) the promise must "touch and concern" land; and (4) the successor must have notice of the promise. In contrast, the traditional common law only required three elements to be met for the *benefit* to run to successors: (1) the promise must be in writing or

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[114] Vertical privity concerns the relationship between an original party and his or her successors. Vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.

[115] Restatement (Third) of Property (Servitudes) §§ 1.3, 1.4 (2000). Under the Restatement, a covenant burden or benefit that does not run with land is held "in gross." A covenant burden held in gross is simply a contractual obligation that is a servitude because the benefit passes automatically to successors to the benefited property. A covenant benefit held in gross is a servitude if the burden passes automatically to successors to the land burdened by the covenant obligation.

[116] There is some doctrinal confusion regarding the difference—if any—between an equitable servitude and a conservation easement. However, under the approach adopted by the Restatement (Third) of Property, easements, profits, covenants—including equitable servitudes, are governed by a single body of law. See Susan F. French, *Highlights of the new Restatement (Third) of Property: Servitudes*, Real Property, Probate and Trust Journal 226, 227 (2000).

[117] Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

[118] If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, the majority of U.S. courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his or her retained lots.

implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must "touch and concern" land.

Under the law of servitudes set forth by the Restatement (Third) of Property (Servitudes), there are eight basic rules that govern expressly created servitudes:[119] (1) a servitude is created by a contract or conveyance intended to create rights or obligations that run with the land if the servitude complies with the Statute of Frauds; (2) the beneficiaries of a servitude are those intended by the parties; (3) servitude benefits held in gross are assignable unless contrary to the intent of the parties;[120] (4) a servitude is valid if it is not otherwise illegal or against public policy; (5) a servitude is interpreted to carry out the intent or legitimate expectations of the parties, without any presumption in favor of free use of land; (6) servitude benefits and burdens run to all subsequent possessors of the burdened or benefited property;[121] (7) servitudes may be enforced by any servitude beneficiary who has a legitimate interest in enforcement, whether or not the beneficiary owns land that would benefit from enforcement; and (8) servitudes that have not been terminated may be enforced by any appropriate legal and equitable remedies.

D. Purchased development rights

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[119] As noted above, under the "integrated approach" adopted by the Restatement (Third), easements, real covenants, profits and equitable servitudes are all categorized as servitudes

[120] Restatement (Third) of Property (Servitudes) § 2.6 (1)–(2) (2000). Early law prohibited the creation of servitude benefits in gross and the creation of servitude benefits in persons who were not immediate parties to the transaction. However, under the Restatement (Third) of Property (Servitudes), the benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property. Also, the benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

Homeowner associations are entitled to enforce covenants despite owning the fact that they do no own land. See, e.g., Streams Sports Club, Ltd. v. Richmond, 109 Ill.App.3d 689, 440 N.E.2d 1264 (1982), aff'd, 99 Ill.2d 182, 457 N.E.2d 1226 (1983); Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill.App.2d 186, 136 N.E.2d 556 (1956); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938).

Courts have also held that developers are entitled to enforce covenants after selling all their lots if intended to have the power to do so. See, e.g., Riverbank Improvement Co. v. Bancroft, 209 Mass. 217, 95 N.E. 216 (1911); Christiansen v. Casey, 613 S.W.2d 906 (Mo.Ct.App.1981).

Even where a conservation easement is not authorized by statute, courts have recognized the benefit in gross as a valid and enforceable interest. See e.g., Bennett v. Commissioner of Food and Agriculture, 576 N.E.2d 1365 (Mass.1991) (where beneficiary of a restriction is the public and restriction reinforces a legislatively stated public purpose, old common law rules barring creation and enforcement of easements in gross have no continuing force; question is whether bargain contravened public policy when made and whether enforcement is consistent with public policy and reasonable).

In the U.S., purchased development rights (PDR) are voluntary legal agreements that allow owners of land meeting certain criteria to sell the right to develop their property to local governmental agencies, a state government, or to a nonprofit organization. A conservation easement is then placed on the land. This agreement is recorded on the title to permanently limit the future use of the land. A PDR is thus an interest in real property that is nonpossessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.[122]

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The buyer essentially purchases the right to develop the land and retires that right permanently, thereby assuring that development will not occur on that particular property. Used strategically, a PDR program can be an effective tool to help maximize a community's conservation efforts. Financial support for PDR programs can be raised through a variety of mechanisms—including bond initiatives, private grants and various taxation options. This may be made more difficult by the fact that lands in Palau are not taxed.

E. Profits à Prendre

A profit à prendre is a common law interest in land that gives a right to enter and take part of the land or something from the land.[123] Although it is not commonly used for

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[121] Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.

[122] At common law PDRs closely resemble negative easements in gross. With the exception of commercial easements in gross, easements in gross were not transferable and expired with the holder. These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the UCEA. In addition to providing protection against being extinguishment, for PDRs drafted as conservation easements under its provisions, the UCEA provides the basis for claiming both federal and state income and estate tax benefits. See Maureen Rudolph and Adrian M. Gosch, Comment, A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143, 146 (2000).

[123] See 28A C.J.S. Easements § 9 (noting that a "right to profits à prendre is a right to take a part of the soil or product of the land of another. It is distinguishable from a pure easement." Historically, there were five types of profits à prendre depending on the subject matter of the profit: (1) rights of pasture—where the taking is done by the mouths of the grazing animals; (2) rights of piscary—to harvest the fish; (3) rights of turbary—to cut turf or peat as fuel; (4) rights of estover—to take wood necessary for furniture for a house; and (5) a miscellaneous group referring to the taking and using of sand, gravel, stone, etc. A profit à prendre cannot generally be used to take minerals.

conservation purposes, profits à prendre have the potential to facilitate the conservation of private lands. For instance, a landowner that wishes to protect the timber on his or her property could grant a profit à prendre to a conservation group with respect to that timber.[124] The conservation organization would have the exclusive right to decide whether and what trees to cut. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. Under the common law, a landowner can grant a profit à prendre to anyone—there is no requirement that the holder of a profit à prendre own adjacent property.[125]

A landowner creates a profit à prendre by granting it in writing to the profit à prendre holder. The landowner specifies precisely what the holder is allowed to enter the land to take. Once the landowner has granted a profit à prendre, he or she must respect its terms. The profit à prendre holder can sue if the owner deals with the land in a way that detracts from the rights of the profit à prendre holder. The holder of a profit à prendre can also sue anyone interferes with the profit à prendre.[126]

A profit à prendre document is designed to outlive the landowner—and perhaps even the profit à prendre holder. In creating a profit à prendre, it is thus essential to consider potential conflicts between a landowner and a profit à prendre holder and describe exactly what the parties intend in the document itself. To protect the profit à prendre holder if the land is subsequently sold, the profit à prendre should be registered in the appropriate land title office. The profit holder

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[124] To help ensure its legal validity, a profit à prendre designed to facilitate conservation should be used only where the protected interest is something that can be taken from the land—e.g., timber, fish, pasture, or something similar. Otherwise, it is possible a court would construe the document as an easement and thus apply the far much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit à prendre to protect things that are not included in these categories of removable items. For instance, a landowner could protect spotted owls by granting a profit à prendre to a conservation organization for the harvest of timber.

[125] Profits à prendre of this kind are called *profits en gross*.

[126] Conversely, the profit à prendre holder must respect the rights of the landowner. The landowner can sue the profit à prendre holder if the holder interferes with the landowner's rights.

can lease, sell, give away or bequeath the profit à prendre to someone else. The holder can also terminate a profit à prendre by giving a written release to the landowner, which would then be registered in the land title office.

B. National And State Conservation Laws –Public Lands

While there is scant authority expressly discussing private conservation efforts, Palau has a relatively rich tradition of public land conservation. This section discusses conservation efforts at the state and national levels.

State Conservation Laws

Palau is comprised of 16 individual states. While the balance of power in Palau rests with the federal government rather than the states,[127] the states have been more active than the federal government in creating conservation areas.[128] The states have created at least 13 conservation areas or protected areas, while enacting at least 20 other pieces of conservation legislation.[129]

In reading the state laws, the states have the power to create a conservation area in perpetuity.[130] One such law reads,

> This Amieliik State Public Law…establishes in perpetuity the Ngaremeduu Conservation Area located in the portions of Ameliik State, Ngatpang State and Ngeremlengui State to maintain and enhance biodiversity while providing for sustainable development by incorporating traditional resource management and active community participation into project planning and development.[131]

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[127] Constitution, Art. XI, § 2.
[128] Palau Nature Facts, published by TNC, Sept. 2002 at 15 (hereafter "Palau Nature Facts"); "State Level Conservation Laws in the Republic of Palau" (hereafter "State Level Conservation Laws").
[129] Palau Nature Facts at 14-15.
[130] State Level Conservation Laws.
[131] *Id.*, Aimeliik State Public Law No. 6-9.

This language implies that there is cooperation among the states named in the law. Additionally, the law creates enforcement powers within the state executive branch and provides for fines for violating the law.[132] The law also acknowledges that the national government may enforce the provisions of the law. Other state conservation laws include fishing restrictions, coral reef use restrictions, mangrove protection, and crab harvest restrictions.[133]

Some of the state laws date back to 1969, but the majority have been enacted in the last 25 years.[134] While there is federal conservation law in the PNC, discussed below, the states are the most active source of conservation efforts. The Nature Conservancy also appears to play an active role in promulgating these state laws.[135] Thus, this has already proven to be a fruitful avenue for conservation efforts and should continue to be pursued.

National Conservation Laws

The PNC contains several statutes aimed squarely at protecting Palau's environment and natural resources.[136] Title 24 of the PNC is entitled "Environmental Protection."[137] It creates two specific conservation areas, the Ngerukewid Islands Wildlife Preserve[138] and the Ngerumekaol Spawning Area.[139] The former creates a preserve that is to be "retained in its present primitive condition where the natural plant and animal life shall be permitted to develop undisturbed."[140] The latter prohibits fishing in Ngerumekaol

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[132] *Id.*
[133] State Level Conservation Laws, contained in accompanying binder.
[134] *Id.*
[135] Palau Country Program (updated May 2003).
[136] 24 PNCA § 101, et seq.; 27 PNCA § 101, et seq.
[137] 24 PNCA § 101, et seq.
[138] 24 PNCA §§ 3001-04.
[139] 24 PNCA §§ 3101-03.
[140] 24 PNCA § 3001.

from April 1 to July 31 of each year.[141] Both statutes create criminal and civil penalties for infractions. Thus, while the national government has not been as active as the states in creating conservation areas, it still has the authority and wherewithal to do so.

Other sections of the Environmental Protection statutes point to Palau's commitment to protecting its environment. For example, the Endangered Species Act of 1975 prohibits the harvest of species on the threatened or endangered lists.[142] Palau's acknowledgment of its unique natural landscape and the value thereof provides a good backdrop for future conservation legislation.

The National Heritage Reserve System Act

The National Heritage Reserve System ("NHRS") Act establishes the mechanism for designing recording, and managing conservation areas.[143] Importantly, states and the national government may designate "private land or any other areas which may be given as gifts to the state for the specific purpose to set aside as [a Palau] National Heritage Reserve."[144] The NHRS appears to be a valuable tool for TNC conservation efforts because it allows for the private donation of lands to NHRS programs.

The national Ministry of Resources and Development manages the Natural Heritage Reserves created by the NHRS. States can designate an area as a Natural Heritage Reserve with the consent of the Ministry, and the national government can designate Republic-owned land.[145] The states may designate state-owned land, private land given as a gift to the state for the purpose of creating a Natural Heritage Reserve, or any land purchased by

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[141] 24 PNCA § 3102.
[142] 24 PNCA §§ 1001-12.
[143] 24 PNCA §§ 3201-3207.
[144] 34 PNCA § 3204(a).
[145] 24 PNCA §§ 3204, 3205.

the state for the purposes of creating a Natural Heritage Reserve.[146] The national government, likewise, may designate Republic-owned lands, state-owned lands conveyed to the Republic, private land given as a gift to the Republic for the purposes of creating a Natural Heritage Reserve, or any lands purchased by the government for the purposes of creating a Natural Heritage Reserve.[147] The statute creates both criminal and civil penalties for infractions.

On paper, the NHRS seems to be the strongest tool for creating conservation areas in Palau. As we have seen in the state laws, conservation areas can be created in perpetuity. It also appears that private individuals can donate land to the states or the national government for the express purpose of creating a Natural Heritage Reserve. However, it is unclear from current data sources whether this has ever transpired. Nonetheless, the institutional tools for creating long-term conservation areas from private investments appear in tact.

VI. Feasibility of Introducing New Tools

Palau's commitment to conservation, style of government, and recent legislative history indicate that the introduction of new legal conservation tools may not be an altogether onerous task. Given Palau's strong commitment to general conservation policies, particularly at the state and national levels, it seems that Palau would be receptive to implementing commonly used conservation tools, such as conservation easements. As an emerging nation, Palau recognizes that one of its few natural assets is its environment, and has taken steps toward protecting it for both future recreational and economic use. Palau's system of government is patterned after that of the

[146] 24 PNCA § 3204.
[147] 24 PNCA § 3205.

United States. Thus, enacting new legislation should, at least facially, follow an analogous path to similar efforts in the United States. Furthermore, the PNC is still being fleshed out. Within the past 10 years alone, Palau has enacted a modern land recording process. Thus, it seems prepared to move quickly and decisively when presented with compelling opportunities to modernize its legal framework.

VII. Recommendations

Due to Palau's relatively modern approach to property rights, there are numerous courses of action that can be taken. Within the realm of private lands conservation, enacting conservation easement legislation and using existing legal tools to set private lands precedents represent the most attractive initial forays. As seen above, Palau also has strong tools for public land conservation that can intersect with private land ownership. This section outlines these recommendations.

A. Enact conservation easement legislation

The most obvious way to establish the legal concept of a conservation easement in Palau would be to enact conservation easement legislation. Under a plain reading of the PNC, Palau citizens suffer few restrictions on the use of their privately owned lands. Creating express authority for conservation easements, then, may not even be necessary. However, at the very least, such legislation would be consistent with the legal ability to dispose of one's property however one sees fit.

B. Develop conservation easement precedent

In the absence of Palaun laws on point, Palau courts will look to U.S. common law as expressed in the ALI Restatements. There is no law in Palau directly on point, but the Restatement (Third) Property clearly recognizes and encourages conservation easements. To clarify this situation in Palau, it could be beneficial to bring a "test" case before a Palau court.

C. Acquire a leasehold interest for the purpose of conservation

Another option in Palau is to acquire a leasehold interest over ecologically important land. Leaseholds are clearly recognized by the PNC and can be held by foreign people or corporations if the term is no greater than 50 years. To fulfill the goal of conservation, however, land use limitations should be included in the lease agreement. This endeavor may also result in a "test" case for the Palaun courts. The time limit is an obvious problem for this scenario.

Use the National Heritage Reserve Act

While the statute ostensibly deals with the creation of government sponsored conservation areas, it may be the best tool for converting privately held lands into conservation zones. The act expressly allows private donors to donate land to the national or state governments for the expresses purpose of creating a conservation reserve. Thus, Palaun citizens could conceivably acquire lands and donate them for such a purpose. It is not clear how foreign funding of such an approach would impact the creation of the conservation area. Since only Palaun citizens may own land, it may be problematic for even a citizen to use foreign funds for such efforts.